IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5137 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

CHAUHAN DHULSINH CHATURSINH

Versus

DIST SUPDT OF POLICE

Appearance:

1. Special Civil Application No. 5137 of 1992

MR SJ SHUKLA with MR YN OZA for Petitioner No. 1

MR LR PUJARI, AGP for Respondent No. 1-3

CORAM : MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 05/04/2002

ORAL JUDGEMENT

1. The petitioner has approached this Court under Article 226 of the Constitution of India praying for issuance of writ of mandamus for quashing and setting aside the impugned order dated 16/6/1992, whereby the

petitioner has been dismissed from the service. He has also sought relief of reinstatement in service with immediate effect with full back wages, continuity of service and all other incidental benefits.

2. The petitioner was recruited in the Police Department in the year 1971 on the post of Police Constable (Unarmed). While in service on 2/12/1988 petitioner proceeded on leave for a period of 60 days with due permission of the superior officers. He was required to report back on duty on 2/1/1989. However, he reported on the duty only on 22/10/1989. During the period he had remained absent without leave the department had served with three notices calling upon him to report on duty immediately. However, the petitioner did not respond to these notices and reported on duty only on 22/10/1989. It is averred by the petitioner in the petition that he had fallen ill with serious ailment after he proceeded on leave and he was almost confined to bed and he was unable to send any intimation or information to the Department regarding his illness and his inability to join the service. According to the petitioner, at the time he reported back on duty on 22/10/1989 he produced all the medical certificates together with purchase bills of the medicines required for his treatment before his superior officer Mrs. Gita Johri, but she refused to look into them solely on the ground that since a criminal proceeding against the petitioner was pending in the Court of the learned Judicial Magistrate First Class at Prantij for committing offence u/S. 145 (3) of the Bombay Police Act, the matter was sub-judice. It may incidentally be noted that for remaining absent without authority the petitioner was prosecuted in the Court of the aforesaid learned Magistrate for committing offence u/S. 145(3) of the Bombay Police Act and in that proceeding he was ultimately convicted by the learned Magistrate vide judgment and order dated 30/7/1991. He was sentenced to pay a fine of Rs.100/- and in default he was sentenced to undergo simple imprisonment for a period of one month. Having been aggrieved by the said judgment and order of conviction and sentence passed by the learned Magistrate, the petitioner approached the Sessions Court, Sabarkantha at Himatnagar by way of Criminal Revision Application No. 38 of 1991. The same was rejected by the learned Addl. Sessions Judge vide judgment and order dated 2/11/ . It also appears from the record of this petition that against the judgment of both the lower Courts the petitioner had approached this Court by filing Special Criminal Application No. 1795 of 1991 and the same was rejected by this Court.

3. Placing reliance on the judgments of the learned Magistrate and also the Court of Sessions and the ultimate order passed by this Court holding the petitioner guilty of the offence u/S. 145 (3) of the Bombay Police Act, respondent no. 1 dismissed the petitioner from service for the misconduct of remaining absent without authority for 293 days i.e. from 2/1/1989 till 22/10/1989, since in the opinion of respondent no. 1 the misconduct alleged against the petitioner was of serious nature. The petitioner has, therefore, approached this Court seeking reliefs already stated above.

4. Mr. Shivang J. Shukla, learned advocate for Mr. Y.N. Oza, learned counsel for the petitioner, submitted that the impugned order deserves to be quashed and set aside, since it has been passed without holding any departmental inquiry against the petitioner and the petitioner has been wrongfully denied the opportunity of defending his interest. He further submitted that before passing the impugned order respondent no. 1 has not issued any notice to the petitioner affording to him any opportunity of being heard and that has also resulted into violation of principles of natural justice. Lastly he submitted that considering the nature of misconduct alleged against the petitioner, the same cannot be placed in the category of "gravest of misconducts" particularly when he remained absent for medical reasons and the punishment of dismissal imposed upon the petitioner is very harsh. He, therefore, submitted that even if the petitioner is found guilty of committing the alleged misconduct, the authority ought to have taken lenient view in the matter and ought to have imposed lesser punishment than that of the dismissal.

4.1. As against that, Mr. L.R. Pujari, Ld. AGP appearing for the respondents submitted that the petition itself is not maintainable as under rule 9 of the Bombay Police Punishment and Appeal Rules, 1956, remedy for filing appeal against the impugned order has been provided for and since the petitioner has not availed of that alternative efficacious remedy, this petition deserves to be dismissed on that sole ground. He further submitted that since respondent no. 1 has passed impugned order keeping in view the judgment of the learned Magistrate delivered in criminal case filed against the petitioner and the consequential order of conviction and sentence which came to be confirmed even by the learned Sessions Court as well as this Court, there was no need to hold any departmental inquiry

against the petitioner. In support of his contention he has placed reliance on a decision rendered in the case of P.D. Waghela v. G.C. Raiger reported in 1993 (2) G.C.D. p. 281. He further submitted that respondent no. 1 has not committed any illegality or there is no violation of principles of natural justice, since the entire issue with regard to the misconduct of the petitioner has been duly scrutinised by the competent Courts of law in judicial proceedings filed before them and respondent no. 1 has passed the order of dismissal entirely relying on the finding given in the criminal case filed against the petitioner. Lastly, he has submitted that though in the impugned order only one instance of unauthorised absenteeism has been referred to, there are two other occasions on which the petitioner has remained absent without any authority and lawful justification. In view thereof, the impugned order cannot be termed as harsh and the punishment imposed by respondent no. 1 is quite in proportion to the gravity of offence. He, therefore, submitted that this petition does not have any merit and it deserves to be dismissed.

5. First I will deal with the contention raised by the Ld. AGP Mr. Pujari in the form of preliminary objection with regard to maintainability of this petition in view of the fact that there is alternative equally efficacious remedy available to the petitioner. He has drawn my attention to section 27 of the Act and rule 9 of the Bombay Police (Punishment and Appeal) Rules (hereinafter referred to as 'the Rules'), wherein appeal against the orders like the one under challenge, is provided for. Though prima-facie the contention appears to be well founded, I am not inclined to accept it because of the fact that the petition has been admitted way back on 30/7/1992 and now it has reached the stage of final disposal and it will not be proper to dispose of the same on such technical ground. Had this objection been taken at the stage of preliminary hearing, it would have been of some meaning. However, at such a belated stage, if the petition is thrown out on such ground, the petitioner will be rendered remediless as the period for filing appeal under aforesaid provision by now must have expired long back. It is therefore, most desirable to dispose of this petition on its merits.

6. I may now turn to the contention raised by Mr. Shukla to the effect that before passing the order of dismissal against the petitioner the Department has not held any inquiry proceedings and for that reason the impugned order is null and void and it is required to be quashed and set aside on that ground alone. I am not

inclined to accept this contention, since perusal of the impugned order clearly shows that it is entirely based on the fact that the petitioner had been prosecuted for remaining on leave without written permission of the superior officer after 1/1/1989 and did not report for duty and he had been convicted and sentenced for committing offence u/S. 145(3) of the Act. Section 145 of the Bombay Police Act (for short 'the Act') provides for awarding penalty for making false statement, etc. and for misconduct of police officers. It reads as under :-

"145. Penalty for making false statement, etc. and for misconduct of Police Officers.-

(1) Any person who makes a false statement or uses a false document for the purpose of obtaining employment or release from employment as a Police Officer, or

(2) Any Police Officer who (a) is guilty of cowardice, or (b) resigns his office or withdraws himself from duties thereof in contravention of Section 29, or (c) is guilty of any wilful breach or neglect of any provision of law or of any rule or order which as such Police Officer, it is his duty to observe or obey, or (d) is guilty of any violation of duty for which no punishment is expressly provided by any other law in force shall, on conviction, be punished with imprisonment for a term which may extend to three months or with fine which may extend to one hundred rupees or with both.

(3) Consequence of failure to return to duty after leave.- A Police Officer who being absent on leave fails, without reasonable cause to report himself for duty on the expiration of such leave shall, for the purpose of clause (b) of sub-section (2), be deemed to withdraw himself from the duties of his office within the meaning of Section 29."

Treating the petitioner's unauthorized absenteeism as withdrawal from the duty in contravention of Section 29 of the Act, P.S.I. Mr. R.C. Rathod had filed complaint against him in the Court of the learned Judicial Magistrate First Class at Prantij, which came to be numbered as Criminal Case No. 632 of 1989. At the end of the trial the learned Magistrate had found him guilty for the aforesaid offence and had convicted him for

offence u/S. 145 (3) of the Act and sentenced him to pay a fine of Rs.100/-, in default to suffer simple imprisonment for one month. Against the judgment and orders of conviction and sentence passed by the learned Magistrate dated 30/7/1991, the petitioner had preferred revision before the Court of Sessions Judge, Himatnagar being Criminal Revision Application No. 38 of 1991, which was rejected by the learned Addl. Sessions Judge at Himatnagar vide judgment and order dated 11/3/1992. Being aggrieved again by the said judgment and order, the petitioner had approached this Court by filing Special Criminal Application, which was also dismissed. Keeping in view the fact that the entire issue was scrutinized by the competent Court of law and ultimately the proceedings had culminated into conviction of the petitioner by the first Court, which came to be confirmed by the Court of Sessions as well as this Court, respondent no. 1 passed the impugned order. The affidavit-in-reply filed by respondents shows that impugned order was passed in accordance with provisions of Article 311 (2) of the Constitution of India. Clause (a) of second proviso to Article 311 (2) of the Constitution reads as under :-

"311 (1) xxx xxx xxx xxx
(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of these charges -

"provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed;

Provided further that this clause shall not apply-

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge;"

Thus, the said clause dispenses with the inquiry in the event of the delinquent being convicted by the competent Court of law for the act of misconduct which could have been the subject matter of the inquiry. The Apex Court in the case of Union of India v/s. Tulsiram Patel

reported in AIR 1985 S.C. 1416 has held "the language of the second proviso to Article 311 (2) is plain and unambiguous. The keywords in the second proviso are "this clause shall not apply". By "this clause" is meant clause (2). As clause (2) requires an inquiry to be held against a government servant, the only meaning attributable to these words is that this inquiry shall not be held. The keywords of the second proviso govern each and every clause of that proviso and leave no scope for any kind of opportunity to be given to a government servant. The phrase "this clause shall not apply" is mandatory and not directory. It is in the nature of a Constitutional prohibitory injunction restraining the disciplinary authority from holding an inquiry under Article 311 (2) or from giving any kind of opportunity to the concerned government servant. There is thus no scope for introducing into the second proviso some kind of inquiry or opportunity by a process of inference or implication. Therefore, the view that even where by the application of the second proviso the full inquiry is dispensed with, there is nothing to prevent the disciplinary authority from holding at least a minimal inquiry or giving to the government servant an opportunity of showing cause against the penalty proposed to be imposed or giving of charge-sheet or at least a notice informing the government servant of the charges against him and calling for his explanation is wholly untenable."

The Full Bench of this Court in the case of P.D. Waghela v/s. G.C. Raiger (supra) has held "the conviction spoken to in clause (a) of the second proviso to clause (2) of Article 311, to form a basis for the dismissal, removal or reduction in rank, could be one recorded by a competent criminal court in the first instance and the preferring of an appeal or revision against such conviction and the pendency of the same will not alter the position and action taken on the basis of such conviction, need not conform to clause (2) of Article 311, since by the express terms of the second proviso thereto, clause (2) of Article 311 is dispensed with." The case on hand stands even on a better footing, since finality has been attached to the order of conviction passed against the petitioner. In view thereof, there was no necessity for the department to hold any inquiry against the petitioner for his misconduct.

Mr. Shukla has further submitted that since the petitioner was not served with any show cause notice intimating about the proposed action of the department,

he has been deprived of his valuable right, which would have enabled him to submit his written reply explaining why the extreme punishment was not warranted for. The department has thereby violated the principles of natural justice and that has caused grave prejudice to the petitioner. I do not see any merit in this contention for two reasons. First reason is that section 26 under Chapter III of the Act deals with procedure to be observed in awarding punishment. It reads as under :-

"26. Procedure to be observed in awarding punishment.- When any officer passes an order for fining, suspending, reducing, removing or dismissing Police Officer, he shall record such order or cause the same to be recorded, together with the reasons therefor and a note of the inquiry made, in writing, under his signature :

Provided that no order for reducing, removing or dismissing a Police Officer shall be passed without giving him a reasonable opportunity of showing cause against the action proposed to be taken against him except in cases referred to in the proviso (a) to clause (2) of Article 311 of the Constitution."

Plain reading of this provision shows that exception carved out in proviso to section 26 is on the line of second proviso to Article 311 (2) and it dispenses with issuance of show cause notice before passing the impugned order in the event of criminal trial for misconduct in question results into delinquent's conviction. The second reason is that the said contention is not based on correct facts. The impugned order itself shows that such notice dated 1/10/1991 was served on the petitioner and in response thereto he had submitted his reply dated 10/10/1991. In fact the petitioner himself has annexed his reply dated 10/10/1991 as Annexure-D to the petition, which clearly shows that it was in response to the show cause notice issued by the department. Thus even when the show cause notice is not placed on record, it can safely be concluded that it has been issued to the petitioner before passing the impugned order. In light of this, in no way it can be said that the petitioner was deprived of his valuable right.

7. This brings me to the question whether in the facts and circumstances of this case imposition of extreme penalty of dismissal from service is justified. Perusing the impugned order, it clearly appears that respondent no. 1 has passed the said order while taking into consideration only the absence of the petitioner

without obtaining written permission of the appropriate officer for the period between 2/1/1989 and 22/10/1989. No reference whatsoever has been made about the two other instances referred to by Mr. Pujari. It may be noted here that in affidavit-in-reply filed on behalf of the respondents though mention regarding two earlier occasions on which the petitioner has remained absent without authority has been made, there is not even a whisper made in the affidavit-in-reply that while passing the impugned order those two occasions have been kept in view. Thus, for the purpose of deciding this petition, in my opinion it will be worthwhile to take into consideration the unauthorized absenteeism commencing from 2/1/1989 upto 22/10/1989 only. As already stated above, the petitioner joined the service in the year 1971 and he remained to be there till the impugned order was passed on 16/6/1992. It may also be mentioned here that the petitioner has made specific averment in the petition to the effect that on resuming the duty he had produced all the necessary medical record together with purchase bills of the medicines required for the treatment to show that he had not remained absent for no reason, but he had been compelled to do so on account of serious ailment, which almost confined him to bed all this period, but respondent no. 1 had not taken them into consideration solely on the ground that criminal prosecution was pending against the petitioner in the court of the learned Judicial Magistrate First Class at Prantij. This fact has not been controverted by the respondents in their affidavit-in-reply. In that view of the matter, I am inclined to believe that there is some substance in what the petitioner has stated and a passing observation made by the learned Magistrate in the judgment that there is no evidence that petitioner had gone to report on duty with medical certificates cannot come in my way in accepting the version of the petitioner. Considering the aforesaid circumstances, it appears that the petitioner, between 2/1/1989 and 22/10/1989, was not able to report on duty because he was suffering from ailments like typhoid, kidney stone and the resultant vomiting. Thus, his absence was for a cause beyond his control. If these factors had been taken into consideration by the concerned authority, namely respondent no. 1, that would have rendered explanation for remaining absent for some part of the period in question, if not the entire one and the result probably could have been slightly different. Unfortunately, the same has not been kept in view solely on the technical ground that prosecution in this behalf was pending in the court of the learned Magistrate. At the same time the petitioner also cannot be allowed to go scot free because he also owed some duty and

responsibility to the department. It is on record that during the period of his absence the department had issued three notices to him calling upon him to report on duty forthwith. These notices were duly received by him. Strangely enough he did not care to give reply to even one notice out of the three, leave apart complying with the same. The petitioner has not tendered any explanation why he did not respond to these notices. Moreover, the nature of ailments spoken of by the petitioner could not have confined him to bed for all this period. It therefore, clearly appears that the petitioner does not state the whole truth. All these circumstances disentitle him to continue in service any longer. However, considering the fact that petitioner had put in about 20 years' service, it will not be just and proper to deprive him of whatever the little benefits that he might have received had he been visited with some lesser punishment than dismissal from the service. In almost similar circumstances, with slight difference, this Court in the case of Sardarsinh Devisinh v/s. District Police Superintendent, Sabarkantha & ors. reported in 1985 G.L.H. 940 had set aside the order of dismissal from service and instead the petitioner of that case was visited with penalty of withholding of two increments with future effect. Of-course, for the reasons stated above, present petitioner cannot be shown leniency to that extent. In my opinion, ends of justice would be met if the order imposing penalty of dismissal from the service is set aside, being harsh and disproportionate to the established guilt and instead the petitioner is visited with penalty of compulsory retirement, which is in accordance with Rule 3 of the Rules, which reads as under:-

"3. (1) Without prejudice to the provisions of any law for the time being in force, the following punishments may be imposed upon any Police Officer, namely :-

xxx xxx xxx xxx xxx xxx

(i-a) compulsory retirement;"

8. The next question for consideration is what benefit can be awarded to the petitioner while imposing the penalty of compulsory retirement. The Apex Court in the case of the State of Madhya Pradesh v/s. Ram Rattan, Civil Appeal No. 422 of 1980 decided on 9th May, 1980 (for complete text see Supreme Court Service Ruling Vol. V at page 275), while comparing nature of two penalties

viz. the penalty of compulsory retirement and penalty of removal from service has held as under :-

"In relation to penalty of removal from service the penalty of compulsory retirement inflicts less harm and, therefore, it is a lesser penalty compared to removal from service. Compulsory retirement results in loss of service for certain years depending upon the date of compulsory retirement and the normal age of superannuation, but the terminal benefits are assured. In removal from service there is a further disqualification which may have some repercussion on terminal benefits."

This Court in the case of Vidyadhar R. Tiwari v/s. The Commandant S.R.P. Group No. V, Godhra, Special Civil Application No. 1329 of 1981 decided on 18th March, 1998 quashed the punishment of dismissal from service imposed upon the delinquent for violating the provisions of Bombay Prohibition Act and instead awarded the punishment of compulsory retirement, but no back wages. While imposing the punishment of compulsory retirement, this Court directed the respondents of that case to pay the benefits which were available to him under law.

In light of these decisions, it is made clear that the petitioner will be entitled to receive terminal benefits admissible to him under the law.

So far awarding of back wages and past monetary benefits are concerned, considering the facts and circumstances of the case, it is out of question and no such benefit can be given to the petitioner.

9. The impugned order of dismissal at Annexure-A passed by respondent no. 1 dated 16/6/1992 is, therefore, quashed and set aside and it is replaced by the order of compulsory retirement, which will be effective from the date of the order of dismissal. It is hereby clarified that the petitioner will not be entitled to any back wages and past monetary benefits. He will, however, be entitled to receive whatever the terminal benefits that are available to him under the law. Rule made absolute to aforesaid extent with no order as to costs.

[AKSHAY H. MEHTA, J.]

* Pansala.